being called. Time Warner and many other telemarketers who generate their own lists of prospective customers or purchase such lists from other companies avoid hospitals, emergency services, unlisted telephone numbers, utilities and businesses in general. It would be disastrous from a cost and business relations standpoint not to. Thus, they are not engaging in "random or sequential dialing." This would be true even where each number on the list of selected names is called in numerical order. Accordingly, such companies, including Time Warner, are not using "automatic telephone dialing systems" as defined by the TCPA,

VI. STATE REGULATION OR PROHIBITION OF CERTAIN TELEMARKETING FUNCTIONS SHOULD BE PREEMPTED UNLESS STATES CONFORM THEIR STATUTES TO THE TCPA

Telemarketing is a national industry which relies on both interstate and intrastate telephone communications. While the TCPA clearly reflects the Commission's jurisdiction over interstate telephone solicitations, the Commission's authority to preempt more restrictive intrastate telephone solicitation regulations is limited by the TCPA. However, as outlined in Time Warner's Comments, Section 227(e) of the TCPA does not deprive the Commission of all authority to preempt; rather, in specified areas, the TCPA does not provide such preemption power. Even where the TCPA itself is not a source for preemption authority, the Commission may promulgate preemptive regulations under the broad authority accorded it by Congress

in the 1934 Act.62/ Time Warner submits that absent consistency among the states' regulation of telemarketing and between such regulation and the TCPA, the Commission can and should exercise its preemptive authority.

A. The Commission May Still Preempt Areas of State Regulation of Telemarketing that Would Thwart National Telecommunications Policy.

A review of the comments filed by various states confirms Time Warner's concern that without Commission guidance in this area, telemarketers will be left at the mercy of a "crazy patchwork quilt" of state regulation which will result in significantly higher costs for the telemarketers and ultimately the consuming public. As discussed infra, this regulatory patchwork already involves the use of different terms, different requirements and different restrictions in many states. Even where similar requirements are intended, the lack of uniformity in terminology can result in an interpretive nightmare for telemarketers. The need for uniformity is manifest.

As the Commission has recognized, the telemarketing industry is an important part of the national marketplace and

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62/ Federal preemption of state law may lawfully result not only from actions taken by Congress itself but also from actions by a federal agency acting within the scope of its Congressionally delegated authority. See, e.g., City of New York v. FCC, 486 U.S. 57, 63-64 (1988); Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984); Fidelity Fed. Savings and Loan Ass'n v. De la Cuesta, 458 U.S. 141 (1982).

has concluded "that it is not in the public interest to eliminate this option for consumers."[63/] Time Warner submits that telemarketing on any kind of a cost-effective, efficient basis could be so burdened by different state regulations as to effectively eliminate the practice. The Commission is not required to stand by and allow such adversity to this major marketing approach when Congress clearly recognized the significance of the industry and intended for telemarketing to prosper. Section 227(e) of the TCPA limits preemption by precluding reliance on the TCPA itself as a source of preemption authority with respect to more restrictive intrastate regulation as to four specified areas.[64/] Thus, the limitation on use of the TCPA as a source of preemption authority in these areas is narrowly circumscribed by the TCPA's definitions of those terms. The Commission retains preemptive authority under the TCPA with respect to more restrictive state regulation that defines or otherwise uses the terms in a manner different than the TCPA or uses different terms that include part or all of the TCPA definitions.[65/]

Similarly, even as to those "more restrictive" intrastate regulations that are consistent with the TCPA definitions, the

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63/ Notice at ¶24.

64/ 47 U.S.C. §227(e).

65/ For example, a review of state laws currently in force indicates wide ranging diversity in the definition of automated telephone dialing systems and in the terms used to describe similar equipment. See Appendix A.

TCPA limitation only extends to reliance on the TCPA as a source for the preemption authority. It does not affect the Commission's ability to preempt such regulations pursuant to its traditional authority conferred by the 1934 Act. Congress has given the Commission broad authority over interstate communications in the 1934 Act pursuant to which it can promulgate preemptive regulations.66/ The Commission's legislative mandate is to regulate "interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . "67/ On the other hand, the Commission is denied jurisdiction "with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . . "68/ The Supreme Court, in Louisiana Public Service Commission v. FCC,69/ articulated the test for determining when preemption is consistent with Section 2(b) of the Act. The Commission may preempt state regulation when the state regulation would thwart or impede the exercise of lawful federal authority over

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66/ 47 U.S.C. §152(a).

67/ 47 U.S.C. §151.

68/ 47 U.S.C. §152(b).

69/ 476 U.S. 355 (1986).

interstate communications, such as when it is not possible to separate the interstate and intrastate portions of the asserted FCC regulation.70/

Although a given telephone solicitation may be intrastate in terms of its points of origination and termination, neither the telemarketing service nor the effect of varied state regulations can be termed purely intrastate. Much of today's telemarketing services use the same equipment and underlying basic services, without regard to the jurisdictional nature of the telemarketing call. Taken as a whole, telemarketing services implicate several direct interstate components involving the use of interstate telephone lines for communication between databases, master computers and regional centers. These interstate communications play a significant role throughout the telemarketing operation, including the development of lists of numbers to be called, the call selection process, the placement of orders, and the shipment of merchandise.

For similar reasons to those discussed above, the Commission may also have jurisdiction under Section 152(a) over

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70/ Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. at 375 n. 4 (1986). See also Maryland Pub. Serv. Comm'n v. FCC, 909 F.2d 1510 (D.C. Cir. 1990); California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Texas Pub. Util. Comm'n v. FCC, 886 F.2d 1325, 1331 (D.C. Cir. 1989); National Ass'n of Regulatory Commissioners v. FCC, 880 F.2d 422, 429 (D.C. Cir. 1989); Illinois Bell Telephone Co. v. FCC, 883 F.2d 104, 116 (D.C. Cir. 1989); North Carolina Utils Comm'n v. FCC, 552 F.2d 1036 (4th Cir.), cert. denied, 434 U.S. 874 (1977); North Carolina Utils Comm'n v. FCC, 537 F.2d 787 (4th Cir.), cert. denied, 429 U.S. 1027 (1976).

intrastate telemarketing as "incidental" to interstate wire communications. As the Commission has acknowledged, "in defining the scope of the Commission's ancillary jurisdiction, courts have emphasized the broad nature of the Commission's statutory mandate and the need to provide the Commission with sufficiently elastic powers to readily accommodate new developments in the field of communications."71/

The District of Columbia Circuit has held specifically that there is "no critical distinction between preemption by Title II regulation and preemption by the exercise of ancillary jurisdiction."72/ The Commission has asserted its ancillary jurisdiction with regard to services ranging from billing and collection (because the services were provided by LECs to interexchange carriers, both of which are subject to some form of the Commission's jurisdiction) to cable television (because, prior to the Cable Act, the service carried off-air signals of television stations which are subject to the Commission's

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71/ Regulatory Policies and Int'l Communications (Notice of Inquiry and Proposed Rule Making, CC Docket No. 86-494, 2 FCC Rcd 1022 n. 110 (1987). ("In GTE Service Corp. v. FCC, for example, the court interpreted the Communications Act as giving the Commission 'broad and comprehensive rule-making authority in the new and dynamic field of electronic communication.'" 474 F.2d 724, 730-731 (2d Cir. 1973)).

72/ Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198, 217 (D.C. Cir. 1982), cert. den. 461 U.S. 938 (1983); see also, California v. FCC, 905 F.2d 1217, 1239-1243 (9th Cir. 1990).

jurisdiction).[73/]

The exercise of this ancillary jurisdiction requires a finding that such regulation would "be directed at protecting or promoting a statutory purpose" or would be necessary "to the effective performance of the Commission's various responsibilities."[74/]

In this case, the patchwork quilt of disparate state laws and regulations concerning intrastate telemarketing and its effect on interstate matters requires preemption, unless such state laws are brought into conformity with the TCPA.

B. The Current Patchwork of State Telemarketing Statutes Makes Compliance Extremely Difficult.

As noted above, there is a wide disparity among state laws governing telemarketing, as well as between such statutes and the TCPA. These laws have different prohibitions for telephone solicitations using automated equipment of various types and, indeed, some are unrelated to the use of artificial or prerecorded voice messages. Some of the statutes ban the use of certain equipment with the capability for automated calls,

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73/ See Billing and Collection Detariffing Order, 102 FCC 2d 1150, 1168 59 RR 2d 1007, recon. denied, 1 FCC Rcd 445, 61 RR 2d 608 (1986); United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968).

74/ Second Computer Inquiry, 77 FCC 2d 384, 433 (1979). (Computer II), aff'd, 84 FCC 2d 50, 92-93 (1980), 88 FCC 2d 512, 50 RR 2d 629 (1981), aff'd sub nom. CCIA v. FCC, 693 F.2d 198 (DC Cir. 1982), cert. denied sub nom. Louisiana P.S.C. v. United States, 461 U.S. 938 (1983); Midwest Video Corp. v. FCC, 406 U.S. 649, 659-60 (1972); Home Box Office v. FCC, 567 F.2d 9, 36, 40, 43 (1977).

such as random or sequential dialers. Others have varied time of day limitations on when such calls can be made. Others require that automatic dialing equipment be registered. Still others have a two year sunset on "do not call" notices while other states have no expiration. As alluded to earlier and evidenced in Appendix A hereto, such state laws use different terms and definitions. No machines or live callers could conduct any reasonably efficient telemarketing under these disparate conditions. The proven benefits and efficiencies of telemarketing would be destroyed.75/

The first type of discrepancies exist with regard to "time-of-day" restrictions. The TCPA does not contain "time-of-day" restrictions for telephone solicitations although the Commission has the authority to establish such limits as it finds necessary. However, time-of-day restrictions imposed by many states limit automated telephone solicitations between certain hours, which vary considerably.76/

75/ Certain software has been developed which can assist telemarketers by limiting calls based on time-of-day and frequency-of-call restrictions if a single standard was applicable. See Comments of Teknekron Infoswitch Corporation. However, this software cannot handle multiple versions of the restrictions or other restrictions such as different types of pre-solicitation messages or activities prohibited in some states and allowed in others.

76/ For example, the following list reflects a sampling of state laws that indicate the diversity that currently exists:

Georgia		8am-9pm
Indiana	M-Su	9am-8pm

(Continued On Next Page)

Additional disparities exist with respect to the need for and content of pre-solicitation messages. The TCPA states, in the case of systems that transmit any artificial or prerecorded voice message via telephone, that the message:

> (1) shall, at the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call, and (ii) shall, during or after the message, state clearly the telephone number or address of such business, other entity, or individual.77/

State-imposed requirements concerning pre-solicitation introductions are varied, including whether or not such introductions must be given at all, whether a live person must give it, whether affirmative consent for the solicitation must be obtained, whether the name, address and phone number of the business or some combination thereof must be provided and, if so, whether it must be provided within a specified time after the call is answered, and whether and when the nature or purpose of the call must be stated, and/or identification of the goods or services involved must be made.78/

(Continued From Previous Page)

Louisiana	M-Sa	8am-8pm
Maine	M-F	9am-5pm
Minnesota		9am-9pm
South Carolina		8am-7pm

Ga. Code Ann. §46-5-23(a)(2)(B) (Michie 1991); Ind. Code Ann. §24-5-14-8 (Burns 1991); 1991 La. Acts 917 §811(2); Me. Rev. Stat. Ann. tit. 10, §1498(3) (West 1991); Minn. Stat. §325E.30 (Supp. 1991); S.C. Code Ann. §16-17-445 (Law Co-op 1990).

77/ 47 U.S.C. §227(d)(3)(A).

78/ See, e.g., Cal. Pub. Util. Code §2874 (Deering 1992); Ga. Code Ann. §43-17-8 (Michie 1991); 1992 Idaho Sess. Laws

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Further variety exists with regard to requirements governing the "disengagement" of the telemarketing call. The TCPA requires, in the case of systems that transmit any artificial or prerecorded voice message via telephone, that the system "automatically release the called party's line within 5 seconds of the time notification is transmitted to the system that the called party has hung up."79/ As evidenced from Appendix B hereto, wide disparity exists among those numerous state laws governing the "disengagement" of automated calls from immediately or as requested to within 30 seconds.

A number of states also require that telemarketers register within the state prior to commencing operations. These registration requirements vary as to the type and amount of information to be provided as well as the timing of the registration.80/ Some states even require scripts or

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27 §48-1004; Ind. Code Ann. §24-5-14-7 (Burns 1991); 1991 Kan. Sess. Laws 158 §2(b)(1); 1991 La. Acts §811(7); Me. Rev. Stat. Ann. tit. 10, §1498(4) (West 1991); Minn. Stat. §325E.29 (Supp. 1991); N.M. Stat. Ann. §57-12-22(B)(1) (Michie 1991); Okla. Stat. tit. 21, §1861(A) (1991): Okla. Stat. tit. 15, §755.1(C)(a) (1991); S.C. Code Ann. §16-17-445 (Law Co-op 1990); Utah Code Ann. §13-25-4(3) (Michie 1991); Miss. Code Ann. §77-3-445(2) (1991); N.Y. Gen. Bus. Law §399-p(4)(a) (Consol. 1992); N.C. Gen. Stat. §75-30(b) (1991).

79/ 47 U.S.C. § 227(d)(3)(B).

80/ See, e.g., Ariz. Rev. Stat. Ann. §44-1272 (1991); Fla. Stat. Ch. 501.605 (1991) amended by Fla. Laws. Ch. 501.605 (1992); Fla. Stat. Ch. 501.607 (1992); 1991 La. Acts 917 §813 (1991); Me. Rev. Stat. Ann. tit. 10, §1498(7) (West 1991); R.I. Gen. Laws §5-61-4 (1991); S.D. Codified Laws Ann. §§37-30-03, 37-30-25 (1991); 1991 Tex. Gen. Laws 496 §115.

transcripts of the calls to be submitted as part of the registration process.81/

For national or regional telemarketers, the lowest common denominator of each of the types of state regulations would become the de facto standard because of the impracticability of incorporating the various standards, definitions and limitations into a nationwide telemarketing operation.

Because such a lowest common denominator approach would not make sense for any national or regional telemarketing effort, the existence of these varied state standards would create a distorted incentive toward interstate telemarketing, with a resultant burden on long distance telephone networks and increased costs to the telemarketer and ultimately, the consumers. In more practical terms, the use of interstate facilities where intrastate ones would do defeats the regional and local marketing advantages of an intrastate telemarketing operation. Even undue regulation in a single state can result in the anomalous situation where an intrastate telemarketing operation would have to resort to interstate communications to reach its intended market.

Moreover, necessary business considerations (such as satisfying the called party's expectations with regard to the

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81/ See, e.g., Fla. Stat. Ch. 501.605 (1991), amended by Fla. Laws Ch. 501.605 (1992); Me. Rev. Stat. Ann. tit. 10, §1498 (7) (West 1991); R.I. Gen. Laws §5-61-4 (1991). This requirement would create heavy regulatory burdens on businesses, seriously hampering efforts to run efficiently. Moreover, it would require the divulgence of proprietary information.

type and timing of telephone solicitations) make it impractical to neatly distinguish between interstate and intrastate calls for purposes of determining which restrictions and prohibitions will be applicable. The fact that a call may originate outside of the state in which the called party is located is not usually considered by the called party. Thus, it may not be realistic in some cases to apply state-imposed restrictions on intrastate telephone solicitations without having such restrictions apply to interstate calls as well.82/ In view of the foregoing, it is clear that an intrastate telephone solicitation is not purely intrastate and that interstate communication as used by national telemarketing services will continue to be adversely affected by a patchwork quilt of varied state regulation of intrastate telemarketing that is more restrictive than the national approach. The increased cost burden will be reflected in the prices and availability of products being sold.

In sum, the Commission has the authority to preempt state telemarketing statutes that are inconsistent with the TCPA. The patchwork of state statutes, each regulating a different aspect of telemarketing in a different way, and its effect on telemarketers demonstrate the need for such preemption. Time Warner has already urged the FCC to advocate restraint by the

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82/ See BellSouth Corp. (State Freeze on Provision of Voice Mail Service), 7 FCC Rcd 1619, 70 RR 2d 584 (1992).

states to avoid undercutting implementation of the TCPA.[83/] Thus, Time Warner respectfully submits that the Commission has two choices: persuade the states to conform their statutes (including enforcement of such statutes) to the TCPA, or preempt any inconsistent state statutory provisions.

VII. CONCLUSION

Time Warner agrees with many conclusions in the Commission's Notice and seeks clarification in other areas. Specifically:

1. A federally-mandated national database of "do not call" names would be expensive and unworkable. Rather, reliance on corporate in-house suppression will achieve the TCPA's intended level of privacy without requiring a new federal bureaucracy.

2. The definition of "established business relationship" was intended by Congress to be flexible enough to allow reasonable corporate judgments regarding inter-division marketing, passage of time between telemarketing calls, and reasonable customer expectations about being telephoned.

3. The meaning of the terms "artificial or prerecorded voice," "ADRMPS," "autodialer," and "automatic telephone dialing system" must be clarified. The TCPA's

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83/ Comments of Time Warner at 26-28.

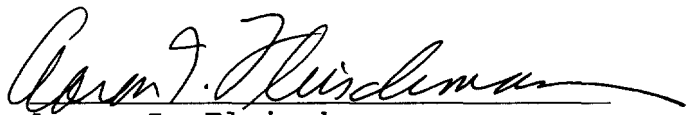
restrictions on artificial or prerecorded voice calls do not involve automatic telephone dialing systems. Accordingly, live operator calls utilizing automatic telephone dialing systems or other automated dialing devices are not prohibited to residences.

4. State regulation of certain telemarketing functions should be preempted where necessary, unless states bring their telemarketing statutes into conformance with the TCPA. The Commission may preempt such state regulation to further the national telecommunications policy articulated by Congress in enacting the TCPA. Moreover, such preemption may be needed to avoid the administrative nightmare of having to deal with varied statutes that regulate different aspects of telemarketing.

Accordingly, Time Warner believes that the approach outlined in the Notice, with the clarifications sought herein, will best achieve the delicate balance between telephone subscriber privacy and the continued viability of an important sector of the U.S. economy.

Respectfully submitted,

TIME WARNER INC.



Aaron I. Fleischman
Charles S. Walsh
Matthew D. Emmer

Its Attorneys

Fleischman and Walsh
1400 Sixteenth Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 939-7900

Date: June 25, 1992

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Appendix A

The TCPA defines "automatic telephone dialing system" as:[1/]

> equipment which has the capacity--
> (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and
> (B) to dial such numbers.

It also uses the phrase "artificial or prerecorded" in referring to messages delivered by certain equipment. The TCPA prohibits the initiation of "any telephone call to any residential line telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party . . ."[2/]

Examples of the varied state laws are as follows:

(a) Prohibition of automated system for the selection and dialing of phone numbers and the playing of a recorded message. See Ariz. Rev. Stat. Ann. §13-2919 (1991); Ark. Code Ann. §5-63-204(a)(1) (1992).

(b) Restriction on automatic equipment which incorporates a storage capability of phone numbers to be called or a random or sequential number generator capable of producing numbers to be called and the capability to disseminate a prerecorded number. Cal. Pub. Util. Code §2871 (Deering 1992).

1/ 47 U.S.C. §227(a)(1).

2/ Id. at §227(b)(1)(B).

(c) Restrictions on use of any device or system . . . for the purpose of automatically selecting or dialing telephone numbers and disseminating prerecorded message and prohibition of random or sequential dialing. Ga. Code Ann. §46-5-23(a)(1) (Michie 1991); 1991 La. Acts 917, §811(2).

(d) Restrictions on use of "automatic dialing announcing device." Ind. Code Ann. §24-5-14-5 (Burns 1991).

(e) Restriction on "any user terminal equipment which (A) can dial; with or without manual assistance, stored phone numbers or random or sequential numbers; (B) recorded message. 1991 Kan. Sess. Laws 158 §2(b)(1).

(f) Restrictions on use of system or equipment that selects, dials or calls telephone numbers and plays recorded messages and prohibition of random and sequential dialing. Me. Rev. Stat. Ann. tit. 10, §1498(2) (West 1991).

(g) Restrictions of "automated dialing or push button or tone activated." Md. Pub. Serv. Code Ann. §78-55C(a)(1991).

(h) Restrictions on "a device that selects and dials telephone numbers and that, working alone or in conjunction with other equipment, disseminates a prerecorded or synthesized voice message to the telephone number called." Minn. Stat. §§325E.26(2) 325E.27 (Supp. 1991).

(i) Restrictions on "automated telephone system." Mont. Code Ann. §45-8-216(1) (Supp. 1992).

(j) Restrictions on "automatically dialing and recorded message." Nev. Rev. Stat. Ann. §598.075 (Michie 1991).

(k) Restrictions on "automatic dial announcing device" and prohibition of random or sequential dialing. Okla. Stat. tit. 15, §755.1 (1991).

(l) Restrictions on "equipment that dials programmed telephone numbers and plays a recorded message when the call is answered." Or. Rev. Stat. §759.290 (1991).

(m) Restrictions on "automatically dialed announcing device which delivers a recorded message without assistance by a live operator for the purpose of making an unsolicited consumer telephone call." S.C. Code Ann. §16-17-446(a) (Law Co-op 1990).

(n) Restrictions on "automatic telephone dialing system" which is defined as "any automatic terminal equipment which stores or produces numbers to be called randomly or sequentially and which delivers a prerecorded message to the number called without assistance of a live operator." S.D. Codified Laws Ann. §§37-30-23, 37-30-25, 37-30-27 (1991).

(o) Restrictions on "automated dialing system with a recorded message" and prohibition of random and sequential numbers Utah Code Ann. §13-25-4 (Michie 1991).

(p) Restrictions on "a device or system of devices used, either alone or in conjunction with other equipment, for the purpose of automatically selecting or dialing telephone numbers without the use of a live operator to disseminate prerecorded message." Iowa Code §476.57 (1991).

(q) Restrictions on "automated dialing, push button or tone activated devices which operate sequentially." Mich. Comp. Laws §484.125 (1991).

(r) Prohibition of "automatic dialing announcing device used to randomly or sequentially dial number." Miss. Code Ann. §77-3-453(5)(1991).

(s) Restrictions on "a device which selects and dials telephone numbers and automatically plays a recorded advertising message" and prohibition of sequential dialing Neb. Rev. Stat. §§87-309.01, 87-307(2) (1990).

(t) Restrictions on "any automatic equipment which incorporates a storage capability of telephone numbers to be called or a random or sequential number generation capable of producing numbers to be called and is used to disseminate a prerecorded message without the use of an operator." N.Y. Gen. Bus. §399-p(1) (Consol. 1992).

(u) Restrictions on "automatic dialing and recorded message player - automatic equipment which incorporates a storage capability of phone numbers to be called or a random or sequential number generation capable of producing numbers to be called and the capability, . . . of disseminating prerecorded message." N.C. Gen. Stat. §75-30 (1991).

Appendix B

The state laws requiring "disengagement" of a telemarketing call appear in the following variations:

(a) after the called party terminates. Cal. Pub. Util. Code §2874 (Deering 1992); Miss. Code Ann. §77-3-445(2)(c) (1991); N.Y. Gen. Bus. Law §399-p(4)(b) (Consol. 1992).

(b) as soon as requested. 1992 Idaho Sess. Laws 27 §48-1003(1)(b).

(c) within 10 seconds. Ind. Code Ann. §24-5-14-6 (Burns 1991); 1991 La. Acts 917 §811(6); Md. Pub. Serv. Code Ann. §78-55C(b) (1991); Minn. Stat. §325E.28 (Supp. 1991); Iowa Code §476.57(3) (1991).

(d) within 25 seconds. 1991 Kan. Sess. Law 158 §2(b)(3).

(e) within 20 seconds. Okla. Stat. tit. 15, §755.1(c)(b) (1991); S.D. Codified Laws Ann. §37-20-28 (1991).

(f) within 30 seconds. Utah Code Ann. §13-25(4)(2) (Michie 1991).

(g) if called party is unwilling to listen. N.C. Gen. Stat. §75-30(b)(4) (1991).

(h) immediately. N.M. Stat. Ann. §57-12-22(b)(5) (Michie 1991); S.C. Code Ann. §16-17-446(B) (Law Op-op 1990).